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SMALL BUSINESS ADMINISTRATION

13 CFR Part 121

RIN: 3245-AG60

Small Business Size Standards: Inflation Adjustment to Monetary Based Size Standards

AGENCY: U.S. Small Business Administration.

ACTION: Final rule.

SUMMARY: This rule finalizes, without change, the U.S. Small Business Administration's (SBA or Agency) June 12, 2014 interim final rule that adjusted monetary small business size standards (i.e., receipts, assets, net worth, and net income) for inflation that has occurred since the last inflation adjustment in 2008. Specifically, the interim final rule increased by 8.73 percent all industry specific monetary small business size standards (except the \$750,000 receipts based size standard for agricultural enterprises established by the Small Business Act). The interim final rule also increased by the same rate the tangible net worth and net income based alternative size standard for the Small Business Investment Company (SBIC) Program and receipts based size standards for Sales of Government Property (Other Than Manufacturing) and Stockpile Purchases. This final rule adopts those increases, without change.

DATES: This rule is effective on [INSERT THE DATE OF PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Carl Jordan, Office of Size Standards, (202) 205-6618 or sizestandards@sba.gov.

SUPPLEMENTARY INFORMATION:

Inflation Adjustment

SBA's small business size regulations require that the Agency examine the impact of inflation on monetary size standards (e.g., receipts, tangible net worth, net income, and assets) and make necessary adjustments at least once every five years.

(13 CFR 121.102(c)). Accordingly, on June 12, 2014, SBA published an interim final rule (IFR) that increased by 8.73 percent all industry specific monetary small business size standards (except the \$750,000 receipts based size standard for agricultural enterprises established by the Small Business Act) (79 FR 33647). Previous to the June 12, 2014 interim final rule, SBA had last updated size standards for inflation on August 18, 2008 (see 73 FR 41237 (July 18, 2008)).

In addition, the Small Business Jobs Act of 2010 (Jobs Act), Public Law 111-240, sec. 1344, Sep. 27, 2010, requires SBA to review all size standards every five years and make necessary adjustments to reflect current industry and Federal market conditions.

In accordance with the Jobs Act, SBA has completed a review of all industry specific monetary based size standards using the latest industry and Federal contracting data available. As part of that review, SBA did not take into consideration inflation that had occurred since 2008. In the IFR, SBA provided reasons for not considering inflation as part of the comprehensive review. Specifically, SBA could not combine static industry data with the fluctuating inflation during the course of the review that produced a series of rules for different sectors at different times. Trying to do so would have resulted in different inflation factors for different industries, thereby making size standards inconsistent among industries.

Summary and Discussion of Public Comments on the June 12, 2014 IFR

On June 12, 2014, SBA issued an IFR (79 FR 33647), increasing by 8.73 percent all industry specific monetary small business size standards (except the \$750,000 receipts based size standard for agricultural enterprises established by the Small Business Act). The adjustment represented inflation, as measured by the Gross Domestic Product (GDP) price index, since the previous inflation adjustment published in July 2008. The 8.73 percent increase was applied to 492 industry specific size standards (487 receipts based and five assets based) and three program specific size standards, namely: (1) tangible net worth and net income based alternative size standards for the SBIC Program (13 CFR 121.301(c)); (2) Sales of Government Property Other Than Manufacturing (13 CFR 121.502); and (3) Stockpile Purchases (13 CFR 121.512). For the reasons SBA provided in the June 12, 2014 IFR, SBA did not increase the tangible net worth and net income based alternative size standards for SBA's 504 and 7(a) Loan Programs (13 CFR 121.301(b)). Increases became effective July 14, 2014.

The IFR requested comments from the public on SBA's methodology of using the GDP price index for adjusting size standards and suggestions for alternative measures of inflation, on whether SBA should adjust employee based size standards for labor productivity growth and technical changes similar to adjusting monetary based size standards for inflation, and on changes to program specific size standards. SBA received 13 comments, eight of which supported the increases. All comments are available at the Federal Rulemaking Portal, www.regulations.gov. Below is a discussion of those comments and SBA's responses.

Comment on the Inflation Index

A construction company commented in favor of increasing size standards for inflation. The commenter recommended, however, that SBA use the Consumer Price Index (CPI), rather than the GDP price index that the Agency used.

SBA response: In the IFR, SBA reviewed various measures of inflation and provided an explanation why the Agency selected the GDP price index, rather than other indices such as the CPI, as the most appropriate measure for adjusting size standards. Moreover, the commenter did not provide a convincing justification as to why the CPI is a better measure of inflation than the GDP price index. For these reasons, SBA is not adopting the commenter's recommendation in this final rule, but will consider it in future adjustments.

Comment on Rounding

While supporting increases to size standards for inflation and using the GDP price index, another commenter recommended that SBA round the results in increments of \$100,000 rather than \$500,000. It seemed "...arbitrary and too generous for some and harmful to others," the commenter noted. The rounding reduced some size standards by \$200,000 – for example, \$27.7 million to \$27.5 million – and this will have an impact on a lot of companies, the commenter maintained.

SBA's response: As in the previous inflation adjustments, SBA rounded the results to the nearest \$500,000 to avoid having too many size standards, in light of public criticism that the Agency's size standards are overly complicated. Having too many size standards, especially with minor differences, can lead to confusion and unnecessary complexity in their application. Among the 16 receipts based size standards adjusted for

inflation, only three (\$15 million, \$20.5 million, and \$27.5 million) were reduced by \$200,000 due to rounding. This is minuscule relative to the adjusted size standards, which SBA believes would not cause much harm to businesses. Thus, in this final rule, SBA is not readjusting the size standards for inflation by rounding them to \$200,000. However, SBA will consider applying alternative rounding amounts in future adjustments to size standards for inflation.

Comment on the SBIC Alternative Size Standard

Fully supporting size standards increases for inflation, one commenter stated that the increase to the Small Business Investment Company (SBIC) size standard allows SBICs to effectively deploy capital to growing small businesses. The commenter recommended that SBA allow automatic, formulaic updates to the size standards based on the GDP price index without prior public participation.

Another commenter supported a greater increase to the tangible net worth and net income based alternative size standard that applies to the SBIC Program. The commenter argued that the increase should be greater because SBA has not increased the alternative size standard for the SBIC Program since the 1994 inflation adjustment. For the increase in the June 12, 2014 IFR SBA used the GDP price index, which resulted in an increase to the SBIC alternative size standard to \$19.5 million in tangible net worth and \$6.5 million in average net income after federal income tax, the commenter explained. Furthermore, the commenter pointed out that had SBA used the increase in the GDP price index since the 1994 adjustment, the resulting size standard would be \$26.5 million in tangible net worth and \$8.8 million in average net income after federal income tax. The commenter further contended that Producer Price Index (PPI) could be a better index to use for the

SBIC Program because most of the SBIC investment goes to small manufacturers. PPI, in the commenter's opinion, would raise the size standard to \$31.3 million in tangible net worth and \$10.4 million in average net income after federal income tax. Finally, the commenter suggested adopting \$20 million in tangible net worth and \$7.0 million in average net income after federal income tax. The commenter also raised concerns about the definition of "tangible net worth." Specifically, the commenter pointed out that for the SBIC Program the only intangible element SBA deducts from net worth to determine tangible net worth is "goodwill." The commenter recommended that the Agency should allow the deduction of all intangibles, not just goodwill, in accordance with U.S. generally accepted accounting principles (GAAP).

SBA's response: In any given measurement period, inflation may be insignificant or even negative. Given the 8.73 percent rate of inflation for the period covered by this rule, SBA believes that a 5-year review for size standards for inflation is adequate. More frequent, smaller increases (or decreases) would lead to confusion in applying size standards, particularly in Federal contracting. Furthermore, to change size standards SBA must comply with Federal rulemaking and the Regulatory Flexibility Act (RFA), which require SBA to seek public comment on contemplated changes, as well as comply with other laws and Executive Orders to address the impact of regulatory changes on small businesses. If inflation is really large, SBA may adjust the size standards more frequently than the 5-year interval.

It should be noted that the subject rule was an IFR, seeking public comments, rather than a proposed rule. Therefore, the revised size standards in the IFR were effective July 14, 2014. The IFR applied the 8.73 percent increase for inflation to all size

standards across the board. Any significant deviation from that would require a separate rulemaking action for the SBIC Program. SBA can consider modifying the size standard for the SBIC Program in the future, provided that relevant data and program needs would support a size standard that is different from the one adopted in this rule. The “tangible net worth” measure of business size applies to the alternative size standards for SBA’s financial programs. Accordingly, any concerns or issues regarding the definition of “tangible net worth” are better addressed to SBA’s Office of Investment and Innovation.

SBA recognizes that inflation may not impact every industry or program equally. SBA’s small business size standards apply to a wide variety of Federal Government programs, including the SBIC Program, and to businesses engaged in multiple industries. Although SBICs may support firms in many manufacturing industries, it is not limited to the manufacturing sector. For these reasons, SBA uses a broad measure of inflation for the entire U.S. economy to determine the most appropriate rate of inflation by which to adjust all of its monetary size standards. In the IFR, SBA explains in detail why the GDP price index, rather than other measures such as the PPI, is the most appropriate measure of inflation for adjusting size standards. SBA’s decisions not to adjust the SBIC alternative size standard from 1994 to the 2008 inflation adjustment were dictated by SBIC’s programmatic considerations. Because the \$20 million tangible net worth and \$7 million net income size standards recommended by the commenter are very close to SBA’s inflation adjusted levels of \$19.5 million tangible net worth and \$6.5 million net income published in the IFR, SBA is not making any change in this final rule.

Comments on the Dredging Size Standard

SBA received six comments on the size standard for the Dredging and Cleanup Services exception under NAICS 237990, Other Heavy and Civil Engineering Construction. The June 12, 2014 IFR increased the size standard for Dredging and Cleanup Services from \$25.5 million to \$27.5 million in average annual receipts. Four of the six commenters strongly supported the increase, while two opposed it. The four commenters supporting the increase maintained that the increase is vital to account for the escalating costs of labor, equipment, and equipment maintenance. They also stated that it will allow firms that grew because of the costs of inflation to remain small and eligible for Federal procurement opportunities for small businesses.

One of the commenters supporting the increase to the dredging size standard for inflation suggested that SBA take the four largest costs on dredging projects (*i.e.*, fuel, labor, insurance and equipment costs) into account to calculate the inflation index for the dredging size standard. Arguing that dredging costs have increased more than the GDP price index, the commenter requested that the size standard for dredging be raised to \$30 million.

Two dredging contractors, on the other hand, stated that the increase is unjustified, and strongly oppose it. They argued that the recent increase to the dredging size standard accounted for inflationary factors and was sufficiently substantial to offset any need for an adjustment for inflation. One opined that a reasonable amount of time should lapse prior to increasing the size standard again. Representing a large marine construction and dredging contractor, another commenter argued that the increase to the dredging size standard reduces his company's (and presumably other similar businesses)

potential bid market while enhancing the market power of the “big smalls,” allowing them to dominate the “small smalls” further. The commenter maintained that fuel prices are actually down while newer engines burn less fuel. Advances in automation, reduced plastic pipe prices, and improved engine metallurgy are a few examples of improved cost efficiencies a firm must adopt to stay competitive, the commenter added.

SBA’s response: On July 18, 2012, as part of SBA’s comprehensive review of size standards under the Jobs Act, SBA had proposed to increase the size standard for the Dredging and Surface Cleanup Activities exception under NAICS 237990 from \$20 million to \$30 million in average annual receipts (77 FR 42197). SBA received several comments against the proposed increase. After reviewing comments and reevaluating the relevant industry data, the Agency adopted a \$25.5 million size standard in the final rule (78 FR 77334 (December 23, 2013)). In the June 12, 2014 IFR, it was increased to \$27.5 million for inflation. Adjustments in the IFR are in addition to revisions that were part of SBA’s ongoing comprehensive size standards review. SBA’s comprehensive size standards review primarily focused on industry structure (i.e., average firm size, startup costs and entry barriers, industry concentration, and distribution of firms by business size) and Federal contracting trends. It did not consider the impacts of inflation on size standards.

For the comprehensive review, SBA reviewed size standards on a Sector by Sector basis over a period of several years. Including inflation in the analysis would have meant applying different inflation rates to different sectors. Specifically, the amount of inflation adjustment would be lower for sectors reviewed earlier in the cycle and higher for those reviewed later, resulting in inconsistent size standards across sectors and

industries. To avoid this, SBA decided to review all monetary based size standards for inflation separately at one time upon completion of the review of all monetary based industry size standards.

In the IFR, SBA increased all monetary based industry size standards by 8.73 percent across the board for inflation, including those that were increased more substantially than the dredging size standard under the comprehensive review. SBA's regulations require that the Agency examine the impact of inflation on size standards at least once every five years and adjust them as needed. Five years had passed between the current inflation adjustment and the previous adjustment issued in July 2008. A majority of the commenters argued that the increase in the dredging size standard is warranted given the increases in fuel, labor, insurance and equipment costs. Moreover, based on the Federal procurement data for fiscal years 2012-2014, no additional dredging firms would gain small business status under the adjusted size standard, suggesting that there would be very minimal impact, if any, on firms below the previous \$25.5 million size standard. For these reasons, SBA is adopting \$27.5 million in average annual receipts as the size standard for Dredging and Surface Cleanup Activities exception under NAICS 237990, as published in the IFR.

Comment on the Size Standard for Architectural Services

An association representing architects expressed concerns that the increase in size standard for Architectural Services (NAICS 541310) from \$7.0 million to \$7.5 million will pose additional burdens on small architecture firms and does not reflect the current business environment in the profession.

The association stated that the SBA's February 10, 2012 final rule on Sector 54 (Professional, Technical and Scientific Services) notes that "the Administration's goal is to increase the size standard participation to 42 percent of each applicable industry." The association stated that under the current \$7 million size standard for architecture, over 95.5 percent of firms qualify as small businesses, more than double the goal, and raising it to \$7.5 million will increase that to 96 percent. The association maintained that there have been significant deflationary pressures on the cost of design and construction projects due to the economic crisis, fewer projects, and increased competition. There has not been sufficient inflation in the sector to justify increasing the size standard, the association added. The association further maintained that the size standard does not reflect the way architects conduct business. For example, an architect may have to hire engineers to complete building projects, and in some cases, similar to travel agencies, an architectural firm can pass through up to 50 percent of its fees to subcontractors, the association added.

The association concluded that additional increase to the size standard will hurt small businesses by allowing larger firms with greater resources and marketing dollars to push out smaller firms without those resources.

SBA's response: To account for inflation that occurred since the previous inflation adjustment of July 2008, in the June 12, 2014 IFR, SBA increased the size standard for NAICS 541310 (Architectural Services) from \$7 million to \$7.5 million in average annual receipts. As part of SBA's comprehensive size standards review, on March 16, 2011, SBA had issued a proposed rule to increase the size standard for NAICS 541310 and other industries under NAICS Industry Group 5413 (Architectural,

Engineering, and Related Services) from \$4.5 million to \$19 million in average annual receipts (76 FR 14323). SBA received significant adverse comments to the proposed increase. After weighing the comments and reevaluating the relevant industry and Federal contracting data, SBA adopted \$7 million as the size standard for NAICS 541310 (77 FR 7490 (February 10, 2012)). As stated elsewhere in this final rule and explained in the IFR, for the comprehensive review, size standards were evaluated against the latest industry and contracting factors, but not against the inflation that occurred since the previous inflation adjustment in July 2008.

The association's statement that in the February 10, 2012 final rule SBA noted that the Administration's goal is to increase the size standard participation to 42 percent of each applicable industry is not correct. SBA has not established such a goal. For the majority of industries the current size standards include 90-95 percent of firms as small, and in some industries more. Thus, the size standard for architects including 95-96 percent of firms as small is not inconsistent with most other industries. Moreover, although the \$7.5 million size standard for architectural services includes 95-96 percent of firms, it includes less than 50 percent of total industry receipts and less than 30 percent of Federal contracting dollars.

SBA does not agree with the argument that, because architectural firms subcontract up to 50 percent of their work to other disciplines, the receipts based size standard does not reflect the industry. In response to the comments on the March 16, 2011 proposed rule that SBA should allow architectural firms to exclude subcontracting costs when calculating the receipts, SBA provided in the February 10, 2012 final rule (see page 7502) an extensive explanation of how the Agency

calculates receipts and what a company can and cannot exclude from the revenue computation.

More importantly, it should be noted that the business model of architectural firms is not comparable with that of travel agencies. A travel agency may collect the full value of a cruise, flight, etc., from its customers, but must remit most of those funds to the provider of the services sold. It retains only a small commission or fee and never has any rights to the balance of the funds it collects. Those funds do not increase the travel agency's asset base and are not available to reduce its liabilities. On the other hand, receipts an architectural firm collects can be used to replenish inventory, pay employees and other subcontracting costs, reduce payables and debt, pay bonuses, and for other business purposes. They add to the business' asset base and net worth, and reduce liabilities. Further, the Economic Census data that SBA uses in determining size standards include these various costs as part of a company's gross receipts. Accordingly, SBA's small business size regulations (13 CFR 121.104) continue to state, "...subcontractor costs, reimbursements for purchases a contractor makes at a customer's request, and employee-based costs such as payroll taxes, may not be excluded from receipts."

SBA also does not agree with the association's argument that an additional increase to the size standard will hurt small businesses by allowing larger firms with greater resources to push out smaller firms without those resources. First, it did not provide any data or analysis to support the argument. Second, the data from the Federal Procurement Data System – Next Generation (FPDS-NG) do not suggest that the increase in the size standard for architectural services from \$4.5 million to \$7 million in 2012 has

hurt firms below the prior \$4.5 million size standard. For example, during fiscal years 2010-2011 (i.e., prior to the size standard increase), firms below \$4.5 million received about 25 percent of total Federal contract dollars awarded under NAICS 541310. Firms under \$4.5 million still accounted for 25 percent of total contract dollars during fiscal years 2013-2014 (i.e., after the size standard increase), despite a 33 percent decline in total Federal dollars in that NAICS code as compared to fiscal years 2010-2011. Moreover, during fiscal years 2013-2014 (i.e., under the \$7 million size standard) firms below \$4.5 million accounted for 85 percent of total dollars awarded to small businesses, as compared to only about 4 percent going to firms from \$4.5 million to \$7 million. Based on these trends, SBA does not expect an increase to the size standard by \$500,000 to cause much harm to and burden on firms below \$4.5 million.

Comment on the Size Standards for NAICS Subsector 562

An elected official also commented on the interim final rule with questions on the rate of increase in the size standards for NAICS Subsector 562, Waste Management and Remediation Services. First, the commenter asked whether the rate of increase in the size standards for waste management service businesses reflects a similar increase in the GDP inflation rate and if not, what factors have been used to justify a larger increase. Second, the commenter asked, if there is a discrepancy, whether the amount of the increase comported with SBA's own protocol used in other business increases. Third, the commenter asked whether there was a large discrepancy in size of businesses in this category or rates of inflation between regions of the country, and if so whether these discrepancies are significant enough to warrant region-specific NAICS size rules.

SBA's response: The rate of increase that SBA applied to adjust size standards in NAICS Subsector 562 reflects the same GDP price index rate that the Agency applied to all monetary based small business size standards. Inflation based on the GDP price index increased 8.73 percent from the first quarter of 2008 to the fourth quarter of 2013. As in the previous inflation adjustments, SBA also used the GDP price index in the latest inflation adjustment, because, as explained in the interim final rule, for purposes of small business size standards it is the most comprehensive measure of movement in the general price level in the economy. As part of the comprehensive size standards review under the Jobs Act, on December 6, 2012, SBA published a final rule increasing several size standards in NAICS Subsector 562 (77 FR 72691). The increases in size standards in NAICS Subsector 562 for inflation are in addition to the increases SBA adopted under the comprehensive review.

SBA establishes small business size standards only on a nationwide basis. SBA believes it would be unmanageable to establish and use size standards if they were established on a regional basis. First, the data SBA uses to review or update size standards are generally limited to the national level. Second, size standards are used to determine eligibility for various Federal programs, including Federal Government contracting, and SBA loan programs. If the size standards were to vary by geographic region, it would be very difficult to use them. For example, it would be difficult to determine what size standards to apply when businesses located in one region bid for Federal work to be performed in another region. Similarly, it would be difficult to determine eligibility for an SBA loan when a firm has operations in more than one region.

General Comment on Size Standards Increases

Another commenter stated that 98 percent of businesses (including non-employer firms) are “truly small” having only 1-19 employees. The commenter noted, correctly, that SBA leaves non-employer firms out of its statistics. The commenter claimed that the average size of SBA’s loan increased from \$182,000 in 2008 to \$547,000 in 2013, while the share of loans under \$100,000, which he claims generally go to truly small businesses, decreased from 24 percent to 9 percent. The commenter used these statistics to argue that the expansion of small business size definitions has allowed large corporations to qualify as small, resulting in significantly larger loans to a few, elite larger corporations. The commenter cited the European Union and Australian small business definitions and other definitions used by the U.S. Congress (e.g., 25 and 50 employees), and stated that SBA’s size standards now include 99 percent of employer firms and 99.4 percent of all firms.

SBA’s response: SBA acknowledges that some of its size standards could include as much as 97 percent to 99 percent of firms in a given industry. However, it is very important to point out that while it may appear to be a large segment of an industry in terms of the percentage of firms, small firms in those industries represent only about a third of total industry receipts and less than 25 percent of Federal contracting dollars.

What constitutes a small business in other countries does not apply and has no relevance to SBA’s small business definitions and U.S. Government programs that use them. Depending on their economic and political realities, other countries have their own programs and priorities that can be very different from those in the U.S. Accordingly, small business definitions other countries use for their Government programs can be

vastly different from those established by SBA for U.S. Government programs. From time to time, the U.S. Congress has used different thresholds, sometimes below the SBA's thresholds, to define small firms under certain laws or programs, but those thresholds apply only to those laws and programs and generally are of no relevance to SBA's size standards. SBA establishes size standards, in accordance with the Small Business Act, for purposes of establishing eligibility for Federal small business procurement and financial assistance programs. The primary statutory definition of a small business is that the firm is not dominant in its field of operation. Accordingly, rather than representing the smallest size within an industry, SBA's size standards generally designate the largest size that a business concern can be relative to other businesses in the industry and still qualify as small for Federal Government programs that provide benefits to small businesses.

SBA does not agree that increases in average loan amounts and decreases in smaller loans are solely due to the increases in size standards for two reasons. First, with the passage of the Jobs Act in 2010, Congress increased the limits for SBA's 7(a) loans from \$2 million to \$5 million, for CDC/504 loans from \$1.5 million to \$5.5 million, and for 7(a) express loans from \$300,000 to \$1 million. Second, at the same time, Congress also increased the tangible net worth and net income limits of the alternative size standard from \$8.5 million and \$3 million to \$15 million and \$5 million, respectively. Under the alternative size standard, businesses that are above their industry size standards can qualify for SBA's loans. These statutory changes may be important factors for the purported changes in SBA's lending. However, such changes do not necessarily mean that truly small businesses are getting fewer loans now than in 2008. In fact, businesses

with less than 10 employees received a total of \$12.1 billion in loans through SBA's 7(a) and 504 Loan Programs in 2014, as compared to \$10.6 billion in 2008. That was in increase of more than 14 percent.

Conclusion

With due consideration of all public comments as discussed above, in this final rule, SBA is adopting the increases in all industry specific monetary size standards for inflation, as published in the IFR. SBA is also adopting the increases in three program specific size standards, namely the SBIC Program, Sales of Government Property (Other Than Manufacturing), and Stockpile Purchases. Similarly, SBA is also deleting references to the Surety Bond Guarantee size standards for contracts awarded in 2005 in the Presidentially declared disaster areas following Hurricanes Katrina, Rita, and Wilma, and the determination date for eligibility under the Agency's Economic Injury Disaster Loan (EIDL) Program in connection with the same 2005 hurricanes, as published in the IFR.

Accordingly, SBA is issuing this final rule to adopt, without change, the interim final rule published on June 12, 2014.

Compliance with Executive Orders 12866, 13563, 12988, and 13132, the Regulatory Flexibility Act (5 U.S.C. 601-612) and the Paperwork Reduction Act (44 U.S.C. Ch. 35)

Executive Order 12866

The Office of Management and Budget (OMB) has determined that this final rule is not a "significant regulatory action" for purposes of Executive Order 12866. To help explain the need for this rule and the rule's potential benefits and costs, SBA provided a

Cost Benefit Analysis in the June 14, 2014 interim final rule. This is also not a “major rule” under the Congressional Review Act (5 U.S.C. 800).

1. Is there a need for the regulatory action?

SBA’s statutory mission is to aid and assist small businesses through various financial, procurement, business development, and advocacy programs. To assist the intended beneficiaries of these programs effectively, SBA must establish distinct definitions of which businesses are deemed small businesses. The Small Business Act (15 U.S.C. 632(3)(a)) (Act) delegates to the SBA Administrator the responsibility for establishing small business definitions. The Act also requires that small business definitions vary to reflect industry differences. The supplementary information to this final rule explains the approach SBA follows when adjusting size standards for inflation. Based on the rise in the general level of prices, SBA believes that an inflation adjustment to size standards is necessary to reflect small businesses in industries with monetary size standards.

2. What are the potential benefits and costs of this regulatory action?

The most significant benefit to businesses of this final rule is to enable those that have exceeded size standards simply due to inflation to regain eligibility for Federal small business assistance programs. This will also help businesses to retain small business eligibility for Federal programs for a longer period. These programs include SBA’s financial assistance programs, economic injury disaster loans, and Federal procurement programs intended for small businesses. Federal agencies use SBA’s 8(a) Business Development Program, Historically Underutilized Business Zones (HUBZone), Women-owned Small Businesses (WOSB), Economically Disadvantaged Women-owned

Small Businesses (EDWOSB), and Service-disabled Veteran-owned Small Businesses (SDVOSB) Programs to provide contracting opportunities for qualified small businesses. Federal agencies also use SBA's size standards for other regulatory and program purposes. These programs assist small businesses to become more knowledgeable, stable, and competitive. SBA estimates that this rule will enable approximately 8,500 firms in industries with receipts based size standards and about 170 firms in industries with assets based size standards, currently above SBA's size standards, to gain small business status and become eligible for these programs. This will increase the small business share of total receipts in industries with receipts based size standards from 31.2 percent to 31.8 percent and the small business share of total assets in industries with assets based size standards from 8.8 percent to 9.4 percent.

Three groups will benefit from the revisions of size standards in this rule:

(1) some businesses that are above the current size standards may gain small business status under the higher, inflation-adjusted size standards, thereby enabling them to participate in Federal small business assistance programs; (2) growing small businesses that are close to exceeding the current size standards will be able to retain their small business status under the higher size standards, thereby enabling them to continue their participation in the programs; and (3) Federal agencies that will have a larger pool of small businesses from which to draw for their small business procurement programs.

Based on the FPDS-NG data for fiscal years 2012-2014, SBA estimates that firms gaining small business status under the inflation adjusted size standards could receive Federal contracts totaling \$150 million to \$175 million annually under SBA's small business, 8(a), SDB, HUBZone, WOSB, EDWOSB, and SDVOSB Programs, and

unrestricted procurements. The added competition for many of these procurements can also result in lower prices to the Government for procurements reserved for small businesses, but SBA cannot quantify this benefit.

Based on the fiscal years 2012-2014 data, SBA estimates about 70 additional loans totaling about \$30 million could be made to these newly defined small businesses under SBA's 7(a) and 504 Loan Programs under the adjusted size standards. Increasing the size standards will likely result in more guaranteed loans to small businesses in these industries, but it is impractical to try to estimate the exact number and total amount of loans. There are two reasons for this: (1) under the Jobs Act, SBA can now guarantee substantially larger loans than in the past; and (2) as described above, the Jobs Act established an alternative size standard (\$15 million in tangible net worth and \$5 million in net income after income taxes) for business concerns that do not meet the size standards for their industry. Therefore, SBA finds it difficult to quantify the actual impact of these inflation adjusted size standards on its 7(a) and 504 Loan Programs.

Newly defined small businesses will also benefit from SBA's Economic Injury Disaster Loan (EIDL) Program. Since this program is contingent on the occurrence and severity of a disaster in the future, SBA cannot make a meaningful estimate of this impact.

In addition, newly defined small businesses will also benefit through reduced fees, less paperwork, and fewer compliance requirements that are available to small businesses through the Federal Government.

To the extent that those nearly 8,700 additional small firms could become active in Federal procurement programs, the adjusted size standards in this final rule may entail

some additional administrative costs to the Government as a result of more businesses being eligible for Federal small business programs. For example, there will be more firms seeking SBA's guaranteed loans, more firms eligible for enrollment in the System of Award Management (SAM) database, and more firms seeking certification as 8(a) or HUBZone firms or qualifying for small business, WOSB, EDWOSB, SDVOSB, and SDB status. Among those newly defined small businesses seeking SBA's assistance, there could be some additional costs associated with compliance and verification of small business status and protests of small business status. However, SBA believes that these added administrative costs will be minimal because mechanisms are already in place to handle these requirements.

In some cases, Federal Government contracts may have higher costs. With a greater number of businesses defined as small, Federal agencies may choose to set aside more contracts for competition among small businesses, rather than using full and open competition. The movement from unrestricted to small business set-aside contracting might result in competition among fewer total bidders, although there will be more small businesses eligible to submit offers. However, the additional costs associated with fewer bidders are expected to be minor since, by law, procurements may be set aside for small businesses, or set aside for competition among 8(a), HUBZone, WOSB, EDWOSB, or SDVOSB Program participants only if awards are expected to be made at fair and reasonable prices. In addition, there may be higher costs when more full and open contracts are awarded to HUBZone businesses that receive price evaluation preferences.

The size standards adjustments in this final rule may have some distributional effects among large and small businesses. Although SBA cannot estimate with certainty

the actual outcome of the gains and losses among small and large businesses, it can identify several probable impacts. There may be a transfer of some Federal contracts to small businesses from large businesses. Large businesses may have fewer Federal contract opportunities as Federal agencies decide to set aside more contracts for small businesses. In addition, some Federal contracts may be awarded to HUBZone concerns instead of large businesses since these firms may be eligible for a price evaluation preference for contracts when they compete on a full and open basis.

Similarly, some businesses defined as small under the current size standards may obtain fewer Federal contracts due to the increased competition from more businesses defined as small under the proposed size standards. This transfer may be offset by a greater number of Federal procurements set aside for all small businesses. The number of newly defined and expanding small businesses that are willing and able to sell to the Federal Government will limit the potential transfer of contracts from large and currently defined small businesses. SBA cannot estimate the potential distributional impacts of these transfers with any degree of precision.

The revisions to the current monetary based industry size standards for 481 industries and 11 “exceptions” and to the monetary based size standards for other specific programs are consistent with SBA’s statutory mandate to assist small business. This regulatory action promotes the Administration’s objectives. One of SBA’s goals in support of the Administration’s objectives is to help individual small businesses succeed through fair and equitable access to capital and credit, Government contracts, and management and technical assistance. Reviewing and modifying size standards, when

appropriate, including periodic inflation adjustments, ensure that intended beneficiaries have access to small business programs designed to assist them.

Executive Order 13563

A description of the need for this regulatory action and benefits and costs associated with this action including possible distributions impacts that relate to Executive Order 13563 is included above in the Cost Benefit Analysis under Executive Order 12866.

In an effort to engage interested parties in this action, SBA gave appropriate consideration to all input, suggestions, recommendations, and relevant information obtained from industry groups, individual businesses, and Federal agencies in preparing this final rule.

The review of size standards in industries and financial assistance programs covered in this final rule is consistent with Executive Order 13563, Section 6, calling for retrospective analyses of existing rules. The last inflationary adjustment of monetary based size standards occurred in July 2008.

In addition to the inflationary adjustment of monetary based size standards published in the June 12, 2014 interim final rule, as part of the comprehensive size standards review, SBA reviewed all the receipts and assets based industry size standards and made necessary adjustments to ensure that they reflect current industry and market conditions.

Executive Order 12988

This action meets applicable standards set forth in Sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden. The action does not have retroactive or preemptive effect.

Executive Order 13132

For purposes of Executive Order 13132, SBA has determined that this final rule will not have substantial, direct effects on the States, on the relationship between the national Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, SBA has determined that this final rule has no federalism implications warranting preparation of a federalism assessment.

Paperwork Reduction Act

For the purpose of the Paperwork Reduction Act, 44 U.S.C. Ch. 35, SBA has determined that this final rule will not impose any new reporting or recordkeeping requirements.

Final Regulatory Flexibility Analysis

Under the Regulatory Flexibility Act (RFA), this rule may have a significant impact on a substantial number of small businesses in the industries covered by the rule. As described above, this rule may affect small businesses seeking Federal contracts, loans under SBA's 7(a), 504 and Economic Injury Disaster Loan Programs, and assistance under other Federal small business programs.

Immediately below, SBA sets forth a final regulatory flexibility analysis (FRFA) of this rule addressing the following questions: (1) What are the need for and objective of the rule? (2) What are SBA's description and estimate of the number of small

businesses to which the rule will apply? (3) What are the projected reporting, recordkeeping, and other compliance requirements of the rule? (4) What are the relevant Federal rules that may duplicate, overlap, or conflict with the rule? and (5) What alternatives will allow the Agency to accomplish its regulatory objectives while minimizing the impact on small businesses?

1. What are the need for and objective of the rule?

As discussed in the supplemental information, the revision to the monetary based size standards for inflation more appropriately defines small businesses. This final rule restores small business eligibility in real terms to businesses that have grown above the size standard due to inflation rather than due to increased business activity. A review of the latest inflation indexes indicates that inflation has increased sufficiently to warrant an increase to the current monetary based size standards.

Section 3(a) of the Small Business Act (15 U.S.C. 632(3)(a)) gives SBA the authority to establish and change size standards. Within its administrative discretion, SBA implemented a policy in its regulations to review the effect of inflation on size standards at least once every five years (13 CFR 121.102(c)) and make any changes as appropriate. As discussed in the supplementary information, inflation has increased at a sufficient level since the time of the 2008 final rule to warrant a further adjustment to size standards at this time.

2. What are SBA's description and estimate of the number of small businesses to which the rule will apply?

SBA estimates that about 8,500 additional firms will become small because of increased receipts based size standards of 476 industries and 11 "exceptions." That

represents 0.2 percent of total firms that are small under current monetary based size standards. This will result in an increase in the small business share of total industry receipts in those industries from 31.2 percent under the current size standards to 31.8 percent under the inflation-adjusted size standards. Due to the adjustment of assets based size standards in five industries, about 170 additional firms will gain small business status in those industries. This will increase the small business share of total assets in those industries from 8.8 percent to 9.4 percent. The size standards adopted in this final rule will enable businesses that have exceeded the size standards for their industries to regain small business status. It will also help currently small businesses to retain their small business status for a longer period. Many firms may have lost their eligibility and find it difficult to compete at current size standards with companies that are significantly larger than they are. SBA believes the competitive impact will be positive for existing small businesses and for those that exceed the size standards but are on the very low end of those that are not small. They might otherwise be called or referred to as mid-sized businesses, although SBA only defines what is small; entities that are not small are “other than small.”

3. What are the projected reporting, recordkeeping and other compliance requirements of the rule?

The inflation adjustment to size standards imposes no additional reporting or recordkeeping requirements on small businesses. However, qualifying for Federal procurement and a number of other programs requires that businesses register in the SAM database and certify in SAM that they are small at least once annually. Therefore, newly eligible small businesses opting to participate in those programs must comply with

SAM requirements. Businesses whose status changes in SAM from other than small to small must update their SAM profiles and complete the “representations and certifications” sections of SAM. However, there are no costs associated with SAM registration or certification. Changing size standards alters access to SBA’s programs that assist small businesses, but does not impose a regulatory burden because they neither regulate nor control business behavior.

4. What are the relevant Federal rules, which may duplicate, overlap, or conflict with the rule?

Under section 3(a)(2)(C) of the Small Business Act, 15 U.S.C. 632(3)(a)(2)(C), Federal agencies must use SBA’s size standards to define a small business, unless specifically authorized by statute to do otherwise. In 1995, SBA published in the Federal Register a list of statutory and regulatory size standards that identified the application of SBA’s size standards as well as other size standards used by Federal agencies (60 FR 57988 (November 24, 1995)). SBA is not aware of any Federal rule that would duplicate or conflict with establishing size standards.

However, the Small Business Act and SBA’s regulations allow Federal agencies to develop different size standards if they believe that SBA’s size standards are not appropriate for their programs, with the approval of SBA’s Administrator (13 CFR 121.903). The SBA’s regulations (13 CFR 121.903(c)) authorize an agency to establish an alternative small business definition for the sole purpose of performing a regulatory flexibility analysis pursuant to the Regulatory Flexibility Act (5 U.S.C. 601(3)), after consultation with the Office of Advocacy of the U.S. Small Business Administration.

5. What alternatives will allow the Agency to accomplish its regulatory objectives while minimizing the impact on small entities?

By law, SBA is required to develop numerical size standards for establishing eligibility for Federal small business assistance programs. Other than varying size standards by industry and changing the size measures, no practical alternative exists to the systems of numerical size standards.

SBA's only other consideration was whether to adopt the size standards presented in the interim final rule with no further increase for the inflation. However, SBA believes that the inflation that has occurred since the publication of the June 12, 2014 interim final rule is not sufficient to warrant an additional increase at this time.

List of Subjects in 13 CFR Part 121

Administrative practice and procedure, Government procurement, Government property, Grant programs — business, Individuals with disabilities, Loan programs — business, Reporting and recordkeeping requirements, Small businesses.

PART 121 – SMALL BUSINESS SIZE REGULATIONS

For the reasons set forth in the preamble, the interim rule amending 13 CFR part 121, which was published at 79 FR 33647 on June 12, 2014, is adopted as a final rule without change.

Dated: January 12, 2016.

Maria Contreras-Sweet,
Administrator.

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